IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0193
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
HENRY BARAJAS,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20054248

Honorable Kenneth Lee, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Karla Hotis Delord — Phoenix
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Stephan J. McCaffery — Tucson
Attorneys for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 A jury found appellant Henry Barajas guilty of four felonies: armed robbery, aggravated robbery, aggravated assault with a deadly weapon, and possession of a firearm

by a prohibited possessor.[1] It found all but the prohibited possession count to be dangerous-nature offenses. The trial court sentenced Barajas to concurrent, presumptive sentences ranging from 2.5 to 10.5 years. Finding neither of the two legal issues raised on appeal warrants reversal, we affirm the convictions and sentences.

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts. *State v. Molina*, 211 Ariz. 130, ¶ 2, 118 P.3d 1094, 1096 (App. 2005). The evidence established that the victim, Christopher P., had just left the apartment of a coworker, Ciarenna L., at approximately 2:00 a.m. when he was robbed at gunpoint by two armed men. The men emerged from the passenger side of a car, driven by a third man, that had pulled up and stopped behind Christopher's car as he was attempting to back out of a parking space.

¶3 The two armed men approached the driver's side window, which was rolled down "about four or five inches." One of them, wearing a gray shirt, gold chain, gray baseball cap, and glasses, pointed a silver semiautomatic handgun at Christopher through his partially open window and said, "Give me what you got." Christopher handed his wallet "straight through the window," after which the two robbers "hauled back in the car and

[1]The indictment and the verdict both refer informally to the offense as possession of a deadly weapon by a prohibited possessor. The offense defined by A.R.S. § 13-3102(A)(4) is actually weapons misconduct by knowingly possessing a deadly weapon while prohibited from doing so.

down the street." The wallet contained Christopher's identification, a debit card, and "about $150."

¶4 A neighbor of Ciarenna's saw the robbery occurring and called police. Ciarenna, upon hearing her neighbor "yelling" and "cussing at somebody," looked out her window and also saw the robbery in progress. Police officers arrived on the scene "[v]ery fast" and promptly broadcast a description of the robbers' vehicle, a dark blue Dodge Intrepid. Another officer heard the report and spotted a car matching that description a few miles away on the same street where the robbery had occurred.

¶5 As soon as he and other officers stopped the Intrepid, its driver and front-seat passenger immediately fled on foot in different directions. Barajas, seated behind the front passenger seat, was detained, and a pat-down search revealed $142 in his "front right pocket." Visibly protruding from under the seat in front of where Barajas had been sitting was a nine-millimeter handgun. With the help of police dogs, other officers soon apprehended the front-seat passenger and also found a second handgun "a short distance from the vehicle."[2]

¶6 Christopher and Ciarenna were transported separately from her apartment complex to where the Intrepid had been stopped and Barajas was being detained.

[2]The driver of the car was believed to be its registered owner, who was identified but apparently never apprehended.

Christopher recognized the robbers' vehicle and identified Barajas as the person who had taken his wallet at gunpoint. Ciarenna also identified both Barajas and the car.

¶7 In the first issue raised on appeal, Barajas contends the trial court erred by rejecting the parties' proposed stipulation to Barajas's status as a prohibited possessor, offered to avoid informing the jury that he had a prior felony conviction. The court rejected the stipulation on the ground that the existence of a prior felony conviction was an element of the offense of prohibited possession and therefore was a fact the jury needed to find. As a result, the parties instead stipulated to the fact that Barajas and his codefendant had each previously been convicted of a felony. Barajas did not object to that procedure, and his codefendant acquiesced in it.

¶8 Because Barajas did not object below, he has forfeited any right to appellate relief unless he can show that fundamental error occurred and prejudice resulted. *See State v. Martinez*, 210 Ariz. 578, n.2, 115 P.3d 618, 620 n.2 (2005); *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Error is fundamental if it "goes to the foundation of [a defendant's] case, takes away a right that is essential to his [or her] defense, and is of such magnitude that [the defendant] could not have received a fair trial." *Henderson*, 210 Ariz. 561, ¶ 24, 115 P.3d at 608. The defendant bears the burden of proving both fundamental error and resulting prejudice. *Id.* ¶ 22.

¶9 The issue Barajas raises resembles the one we resolved in *State v. Lopez*, 209 Ariz. 58, 97 P.3d 883 (App. 2004). The defendant in *Lopez* was likewise a prohibited

possessor of weapons under A.R.S. § 13-3101(A)(6)(b) by virtue of a prior felony conviction.[3] 209 Ariz. 58, ¶ 8, 97 P.3d at 885. He, too, offered to stipulate that he was a prohibited possessor, but the state declined the stipulation, arguing "that his status as a prohibited possessor was an element of the offense the state was required to prove." *Id.* ¶ 4. We held "the trial court did not err by refusing to compel the state to accept [the defendant]'s stipulation," *id.* ¶ 8, because the fact of his prior felony conviction was an element of the offense of prohibited possession, *id.*, and "he was not entitled to keep from the jury one of the elements of the crime charged," *id.* ¶ 7. And we expressly rejected the contention, made there by Lopez and here by Barajas, "that the existence of a prior felony conviction is not an 'element' of the offense of weapons misconduct, but merely a descriptive definition." *Id.* n.2.

¶10 Barajas faults our decision in *Lopez* for "fail[ing] to provide a reasoned basis" for declaring a defendant's prior felony conviction an element of the offense of prohibited possession. But the only authority he cites for his assertion that "this Court's position is wrong" is a Washington case interpreting Washington's statutes criminalizing child molestation and defining other terms. That case, *State v. Lorenz*, 93 P.3d 133 (Wash. 2004), is inapposite and unhelpful here.

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[3]The second component of § 13-3101(A)(6)(b)—that the person's "civil right to possess or carry a gun or firearm has not been restored"—is not an element of the offense but an exception to the statute, which the defendant has the burden of proving. *See State v. Kelly*, 210 Ariz. 460, ¶ 6, 112 P.3d 682, 684 (App. 2005).

¶11 "[T]he Due Process Clause protects [an] accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970); *State v. Farley*, 199 Ariz. 542, ¶ 10, 19 P.3d 1258, 1260 (App. 2001) (quoting *Winship*). In effect, Barajas argues his status as a "prohibited possessor" is an element of the offense of weapons misconduct under § 13-3102(A)(4), but the underlying facts that make him a prohibited possessor as the term is defined in § 13-3101(A)(6)(b) are not. The illogic of his argument is underscored by contemplating what the state would need to prove if, instead of admitting his prohibited-possessor status, Barajas denied it. That he had been convicted of or adjudicated delinquent for a felony offense would then self-evidently be among the "fact[s] necessary to constitute the crime" of prohibited possession and, hence, an element of the offense. *Winship*, 397 U.S. at 364, 90 S. Ct. at 1073.[4]

¶12 Barajas next argues fundamental error occurred when an officer mentioned on direct examination that Barajas had invoked his right to remain silent after being advised of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). The precise exchange of which he complains followed Officer Atkinson's testimony about the efforts

[4]The specific issue Barajas might have raised on these facts, had he preserved it by objecting below, is whether the trial court properly prevented the parties from stipulating to the existence of an element of the offense when both parties wished to stipulate, a different issue than the one presented in *Lopez*.

made to locate Barajas's companions who had fled from the Intrepid as soon as it was stopped.

> Q Now, you said there was a third individual in the car. What happened to him?
>
> A He remained in the car. We went back and had contact with him. Held onto him. And I tried to ask him questions. I first read him *Miranda* rights, and he declined.
>
> Q I don't want to go into that. You had contact with him, you read him his rights. Is that person in the courtroom?
>
> A Yes, he is.

Defense counsel interposed no objection, and the subject was not mentioned again at trial.

¶13 Because Barajas failed to object below, we review for fundamental, prejudicial error only. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. We reject his contention that Atkinson's comment, which the prosecutor was not trying to elicit, must have been deliberate. Barajas argues that, because Atkinson had been a police officer for over four years when he testified at trial in April 2006, "he must have known that his testimony was improper." Nothing in the record supports that claim or suggests Atkinson's statement was anything other than a literal recounting of what had transpired between himself and Barajas at the scene, offered in response to the prosecutor's open-ended question about "[w]hat happened" to Barajas. The prosecutor immediately deflected the comment and proceeded to ask if the officer could identify Barajas in court. Thus, Barajas's

refusal to answer questions after being advised of his rights received a single, passing mention without emphasis or elaboration.

¶14 Unlike the situation in which improper references to a defendant's post-*Miranda* silence have been made to impeach the defendant, *e.g.*, *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 2245 (1976); *State v. Sorrell*, 132 Ariz. 328, 330, 645 P.2d 1242, 1244 (1982), no similar intention is evident here. The prosecutor moved hastily away from the officer's statement and asked nothing further about Barajas's silence. Contrary to Barajas's characterization of the state's identification evidence as "flimsy at best," the totality of the evidence of his guilt was substantial. After reviewing the entire record, we are not persuaded that the brief and apparently inadvertent mention of his refusal to answer questions after being informed of his *Miranda* rights had any significant effect on the jury's verdicts.

¶15 Finding neither fundamental error nor prejudice, we affirm the judgment of convictions and sentences.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

PHILIP G. ESPINOSA, Judge